Supreme Court, U.S.
FILED
SEP 10 2001

No. 01 460

In the
Supreme Court of the United States
OCTOBER 2000 TERM

CAMDEN PROPERTIES CORPORATION;
WAKEFIELD PROPERTIES, LTD.,

Petitioners

v.

NORMA J. HURT,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jonathan C. Scott, Esq.
SCOTT & SCOTT, LLP
999 Walt Whitman Road
Melville, NY 11747
(631) 271-6448
Counsel for Petitioner

Dated: September 10, 2001

80 pp

QUESTIONS PRESENTED

1. Whether the Petition for Writ of Certiorari should be granted in order to reaffirm the power of the Federal Courts to vacate judgments procured by fraud more than one year after entry of the judgment, which power is not limited by the Federal Rules of Civil Procedure?

2. Whether the Petition for a Writ of Certiorari should be granted to resolve an inter-circuit conflict and conflict between the Ninth Circuit and this Court as to whether or not the one year time limits contained in Federal Rule of Civil Procedure 60(b)(1)-(3) are jurisdictional, and as to whether or not such motions may be made outside the usual time limits when the movant is unable to make an application within one year of the judgment by circumstances beyond its control?

3. Does the term "fraud on an adverse party" under Rule 60(b)(3) include successors in interest or non-parties?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Camden Properties Corp. and Wakefield Properties, Ltd. (collectively "Camden") appeared by counsel as the plaintiff in an adversary proceeding brought in the United States Bankruptcy Court for the District of Arizona. Norma Hurt, the debtor, appeared by counsel in the same court as the defendant in the adversary proceeding. The same two parties appeared by counsel before the Bankruptcy Appellate Panel for the Ninth Circuit and the United States Court of Appeals for the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Neither the Petitioner, nor any of the other parties below, is a publicly traded corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 9

POINT I – The petition for a writ of certiorari should be granted to review an issue of great importance to the integrity of the judicial system, to protect the integrity of the judiciary under its supervisory role, and to resolve an inter-circuit split as to whether the Federal Courts have the inherent authority to vacate a judgment for fraud on the court, and such an action is not subject to the one year time limit imposed by Federal Rule of Civil Procedure 60(b)(3), the Circuits are split and this Court must exercise its supervisory

role to protect the integrity of the judicial system. 10

A. The federal courts must have the inherent authority to vacate judgments procured by fraud, and this Court should grant the writ in its supervisory role.
..... 12

B. The Ninth Circuit's opinion in this case created a conflict with other Circuit Courts which distinguish between general fraud and fraud on the court.
..... 16

C. The Ninth Circuit rewrote Rule 60(b)(3) when it held that it applied to an entity in privity with an original party.
..... 22

D. The writ should be granted because the Ninth Circuit's ruling that Rule 60(b)(3) applied conflicts with the decisions of other courts which have held that fraud committed by a party's representative is not fraud committed by "an adverse party" within the meaning of the Rule.
..... 23

POINT II THE WRIT OF CERTIORARI SHOULD BE GRANTED TO BECAUSE THE HOLDING OF THE NINTH CIRCUIT THAT THERE ARE NO EXCEPTIONS TO THE ONE-YEAR LIMIT CONTAINED IN RULE 60(B)(1)-(3) IS AT ODDS WITH SUPREME COURT PRECEDENT AND IMPROPERLY RESTRICTS THE POWER OF THE FEDERAL COURTS TO ERADICATE FRAUD WHERE THERE ARE

EXTRAORDINARY CIRCUMSTANCES WHICH PREVENT AN ENTITY FROM BRINGING AN APPLICATION WITHIN ONE YEAR.
..... 24

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989) 24

Averbach v. Rival Mfg. Co., 809 F.2d 1016 (3d Dep't 1987), cert den., 482 U.S. 915 (1987) 21

Calderon v. Thompson, 523 U.S. 538, 557 (1998) 15

Chambers v. Nasco, Inc., 501 U.S. 32, 45 (1991) 13

Fierro v. Johnson, 197 F.3d 147, 153 (5th Cir. 1999), cert den., 530 U.S. 1206 (2000) 16

First National Bank of Louisville v. Lustig, 96 F.3d 1554, 1573 (5th Cir. 1996) 14

Fraige v. American-National Watermattress Corp., 996 F.2d 295, 299 (Fed. Cir. 1993) 21

Hazel-Atlas Co. v. Hartford-Empire Co., 322 U.S. 238, 248 (1944) 13, 18-20

In Re Bryan, 244 F.3d 803, 804 (11th Cir. 2000) 16

Klapprott v. United States, 335 U.S.601 (1949) 25, 26

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988) 20

Marshall v. Holmes, 141 U.S. 589, 597 (1891) 17

Marshall v. United States, 360 U.S. 310, 311 (1959) 11

Martin v. Wilks, 490 U.S. 755, 761 (1989) 28

Meindl v. Genesys Pacific Technologies, Inc. (In re Genesys Data Technologies, Inc.), 204 F.3d 124, 130 (4th Cir. 2000) 21

Oliver v. Gramley, 200 F.3d 465, 466 (7th Cir. 1999) ... 14

Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) 23

United States v. Baus, 834 F.2d 1114, 1121 (1st Cir. 1987) 26

United States v. Cirami, 563 F.2d 26, 31 (2d Cir. 1976) 27, 28

United States v. McDonald, 161 F.3d 4 (4th Cir. 1998) .. 15

Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946) 13, 14

Weldon v. United States of America, 70 F.3d 1, 5 (2d Cir. 1995) 20

Workman v. Bell, 227 F.3d 331, 335 (6th Cir. 2000) (plurality opinion for equally divided court), cert den., 121 S.Ct.1194 (2001) 15

Young v. United States, 481 U.S. 787, 808 (1987) 11

FEDERAL STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 157(b)(2)(O) 1

28 U.S.C. § 158(b) 1

28 U.S.C. § 158(d) 2

Supreme Court Rule 13.1 2

28 U.S.C., § 1655 3

Federal Rule of Civil Procedure 60 ..... .passim

OPINIONS BELOW

The opinion of the Bankruptcy Court of the District of Arizona is not reported. The opinion of the Bankruptcy Appellate Panel for the Ninth Circuit is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit is not reported. The text of all three opinions are contained in the appendix.

JURISDICTION

The Bankruptcy Court had jurisdiction over the court proceeding pursuant to 28 U.S.C. § 157(b)(2)(O). The Bankruptcy Panel for the Ninth Circuit had jurisdiction over the appeal from the final order of the Bankruptcy Court pursuant to 28 U.S.C. § 158(b). The BAP order was filed on February 18, 2000, and Camden filed its notice of appeal to the United States Court of Appeals for the Ninth Circuit on March 15, 2001. The United States Court of Appeals for the Ninth Circuit had

jurisdiction to hear the timely appeal from the order of the Bankruptcy Appellate Panel pursuant to 28 U.S.C. § 158(d). The order of the Ninth Circuit was entered on June 12, 2001. This petition is timely as it is being filed on or before September 10, 2001, within ninety days of the order. Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional provisions involved. Federal Rule of Civil Procedure 60 states in pertinent part:

Rule 60. Relief From Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or

proceeding for the following reasons . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . .; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.

STATEMENT OF THE CASE

The writ should be granted because (1) the Ninth Circuit's opinion in the present case conflicts with the rulings

of other circuit courts of appeals which have held that the time limits contained in Rule 60(b)(1)-(3) do not apply to allegations of fraud on the court, (2) the Ninth Circuit's holding that "adverse party" within the meaning of Rule 60(b)(3) includes entities in privity with a party, (3) the Ninth Circuit's holding conflicts with the holding of this Court and other circuit courts of appeals which have permitted motions to vacate judgments to be made after one-year if there are exceptional circumstances.

Camden petitions this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit affirming the Order and Judgment of the United States Bankruptcy Appellate Panel for the Ninth Circuit which affirmed that branch of the order of the United States Bankruptcy Court for the District of Arizona which denied Camden's application to vacate the prior judgment of the Bankruptcy Court purporting to vest title to certain real property

in Hurt. Camden and Wakefield later received interests from the co-owner in two of these properties, located at 500 E. Broadway and 1034 E. Julie Street in Maricopa County, Arizona. Title was clouded by the bankruptcy court judgment.

The bankruptcy court, the BAP and the Ninth Circuit all opined that a claim of fraud, including claims of fraud on the court is barred after the passage of one year.

On December 9, 1985, Hurt's creditors filed an involuntary Petition commencing the case under Chapter 11 of the Bankruptcy Code.

On January 23, 1990, the parties before the bankruptcy court, not including Camden, reached a settlement agreement, outlining the responsibilities of the parties (Part A) and listing 67 parcels of real property (Part B). The parties excluded some of the properties from the list by drawing red lines through the listed property and/or by bracketing the property in blue boxes. (A. 9). Camden and Wakefield allege that Eagleburger

fraudulently included four parcels of property in the settlement agreement he tendered to the Bankruptcy Court which were not to be awarded to Hurt. (A. 11) On April 3, 1990, the Bankruptcy Court entered an order approving the settlement agreement and incorporating the settlement agreement tendered by Eagleburger into the judgment. (A. 11). The fraud claim in this case arises from this 1990 judgment as it incorporated the settlement agreement Camden and Wakefield allege was altered.

Camden later obtained an interest in the 500 E. Broadway, Arizona property, and Wakefield obtained an interest in the 1034 E. Julie Street property. (A. 9). Both properties were included in the 1990 judgment.

On October 1, 1998, Wakefield and Camden filed a 60(b) motion to vacate the 1990 bankruptcy court judgment. (A. 10). They each had respective interests in the 500 E. Broadway

and 1034 E. Julie Street properties – both of which were included in the 1990 judgment. (A. 10-11).

The Bankruptcy Court denied the 60(b) motion without reaching the merits of the fraud claim and without an evidentiary hearing, holding that the court had no jurisdiction because the motion was made after one year from the entry of the judgment. The court also determined that Camden and Wakefield lacked standing because they were not parties to the original litigation and were not entities in existence at that time.

The Bankruptcy Court also granted Hurt's request for sanctions, but that portion of the order was vacated by the BAP. (A. 20-22, 37-38).

Camden appealed the bankruptcy court's order. In its opinion, the BAP concluded that Camden's allegations of fraud fell "squarely under Rule 60(b)(3)" and that Camden's 60(b) motion was time-barred under that section's one-year filing deadline. (A. 14). The Court concluded that it was powerless

to set aside the judgment as the one-year requirement is jurisdictional and cannot be extended. (A. 15). Without determining the standing issue, the court concluded that Camden and Wakefield may have had standing to bring the 60(b) motion but that this standing question was inconsequential as the bankruptcy court deemed the motion untimely. (A. 19). At no point did the BAP address its inherent power to remedy fraud on the court. Finally, the BAP reversed the sanctions against Camden and Wakefield based on Hurt's failure to comply with the procedural requirements of Rule 11. (A. 22).

Camden appealed to the Court of Appeals for the Ninth Circuit. In an unpublished opinion, the Ninth Circuit affirmed the BAP's opinion. (A. 1-5). The Ninth Circuit held that Camden could not use Rule 60(b)(6) to attack the judgment because the claim fell within the parameters of Federal Rule of Civil Procedure 60(b)(3) and Rule 60(b)(6) cannot be used if

the claim falls under subsections 1-5. (A. 2). It failed to address the argument that its inherent power to eradicate a fraudulent judgment was not subject to any time limit. The Ninth Circuit also held that Camden was bound by the judgment against their predecessors in interest, even though the corporations were not even formed at the time the judgment was entered. (A. 3-4).

Camden now files this timely petition for certiorari.

REASONS FOR GRANTING THE PETITION

The Petition for Writ of Certiorari should be granted to resolve an important issue concerning the power of the federal courts to vacate judgments obtained by fraud and fraud on the court and to address the question of whether fraud on the court is cleansed after one year. To permit a judgment obtained by fraud to stand goes to the very heart of the integrity of the judicial system. However, the Ninth Circuit, and the lower courts, held that the power of the federal courts to vacate fraud

was limited by the Federal Rules of Civil Procedure and further that the one year time limits under Rule 60(b) are jurisdictional. A court's inherent power to vacate a judgment obtained by fraud is not restricted by the Federal Rules of Civil Procedure. The text of Rule 60 says as much. The extent of the court's authority to vacate such a judgment gives rise to an important issue that is not only of interest to the parties in this action, but to litigants nation-wide. Federal courts cannot be rendered powerless to give relief when fraud is perpetrated simply because more than one year has passed.

POINT I – The petition for a writ of certiorari should be granted to review an issue of great importance to the integrity of the judicial system, to protect the integrity of the judiciary under its supervisory role, and to resolve an inter-circuit split as to whether the Federal Courts have the inherent authority to vacate a judgment for fraud on the court, and such an action is not subject to the one year time limit imposed by Federal Rule of Civil Procedure 60(b)(3), the Circuits are split and this Court must exercise its supervisory role to protect the integrity of the judicial system.

The issue raised by this petition is of great importance to litigants throughout the nation because it concerns the authority of the courts to eradicate fraud. This Court has granted certiorari in previous cases to exercise its supervisory role over the course of proceedings in the federal trial and appellate courts. *Young v. United States*, 481 U.S. 787, 808 (1987); *Marshall v. United States*, 360 U.S. 310, 311 (1959). The lower courts held that the one-year time limit contained in Rule 60(b)(1)-(3) is jurisdictional, and that the courts lack the power to vacate judgments procured by fraud if the application is made more than one year after that date. Such a rule would bring disrepute upon the legal system, as the courts would be powerless to remedy fraud if, due to circumstances beyond the control of the victim of the fraud, the victim was not capable of making an application within one year. In addition, Rule

60(b) specifically provides that the one-year time limit does not apply to actions for fraud on the court.

A. The federal courts must have the inherent authority to vacate judgments procured by fraud, and this Court should grant the writ in its supervisory role.

The lower courts held that they were powerless to vacate the judgment, feeling themselves bound by the time-limitations contained in Rule 60(b). But the federal courts are not impotent to root out fraud, and the one-year time limit in Rule 60(b)(3) is not jurisdictional. Rather, the federal courts have the inherent power to vacate judgments because of fraud. There are numerous powers that the federal courts may exercise, which are not derived from any statute or rule. For example, this Court has held that the federal courts have the inherent authority to sanction attorneys, even if the attorney's actions do not fall within the purview of Federal Rule of Civil Procedure 11, Federal Rule of Appellate 38, or 28 U.S.C. § 1927.

Chambers v. Nasco, Inc., 501 U.S. 32, 45 (1991). As this Court stated in *Chambers*, such powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.*, 501 U.S. at 43. The Court in *Chambers* held, citing *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944), that the federal courts have the inherent right to vacate their own judgment upon proof that a fraud has been committed. *Id.*, 501 U.S. at 44. The courts also have the right to *investigate* whether a fraud has been committed, and again this power is inherent and not based upon any rule or statute. *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946). In *Universal*, the petitioner brought two actions against two companies for patent infringement. These actions resulted in a judgment in favor of the holder of the patent. The patent holder than commenced suits against other companies, and invoked the first judgment

as res judicata. During the latter cases, the attorneys who represented the defendants in the first action - and who were representing the defendants in the latter actions, discovered some evidence that the first judgment was obtained by bribing the presiding judge. However, at the time the defendant in the first action had settled the matter and was unwilling to bring an action or motion to vacate the judgment. This Court held that the lack of a client to bring a formal motion was not an impediment to the court investigating a fraud perpetrated upon it. *Universal Oil*, 328 U.S. at 580. Similarly, in *First National Bank of Louisville v. Lustig*, 96 F.3d 1554, 1573 (5th Cir. 1996), the Fifth Circuit held that the courts had the inherent authority to vacate a non-final order obtained by fraud, notwithstanding the fact that Rule 60 only applies to judgments. The Circuit Courts have also held that the courts have the inherent power to dismiss actions because of fraud. *See e.g.*, *Oliver v. Gramley*, 200 F.3d 465, 466 (7th Cir. 1999).

While this Court has suggested, although it has not expressly held, that fraud on the court is an exception to the prohibition contained in the Anti-Terrorism and Effective Death Penalty Act (AEDPA) against successive habeas corpus petitions. *Calderon v. Thompson*, 523 U.S. 538, 557 (1998), the Ninth Circuit has now held in this case that fraud on the court is cleansed after one year. Non-habeas civil litigation is a substantial part of the dockets of the federal Courts and the Ninth Circuit is one of the largest and busiest Circuit Courts in the United States. The Sixth Circuit has expressly held that fraud on the court is an exception to the rule against successive petitions. *Workman v. Bell*, 227 F.3d 331, 335 (6th Cir. 2000) (plurality opinion for equally divided court), *cert den.*, 121 S.Ct.1194 (2001). So has the Fourth Circuit, although in an unpublished opinion. *United States v. McDonald*, 161 F.3d 4 (4th Cir. 1998). Several other Courts of Appeals have suggested the possibility that the exception exists, but have not

addressed the question. *In Re Bryan*, 244 F.3d 803, 804 (11th Cir. 2000); *Fierro v. Johnson*, 197 F.3d 147, 153 (5th Cir. 1999), *cert den.*, 530 U.S. 1206 (2000).

Against this backdrop, the holdings of the lower courts here that the federal courts cannot take any action to eradicate fraud after one year frustrates the power of the courts to uphold the integrity of the judicial system. This Court should accept review to uphold the inherent power of the federal courts to investigate and eradicate fraud.

B. The Ninth Circuit's opinion in this case created a conflict with other Circuit Courts which distinguish between general fraud and fraud on the court.

In its terse opinion, the Ninth Circuit made the conclusory statement that Federal Rule of Civil Procedure 60(b)(6) may not be used as a substitute if relief is otherwise available under Rule 60(b). (A. 2). The Ninth Circuit then went on to apply Rule 60(b)(3) and, as the motion was brought

more than a year after judgment was entered, denied the application as jurisdictionally barred and untimely. The Ninth Circuit's holding in this case conflicts with various federal circuit court decisions which distinguish between general fraud and fraud on the court. Actions to vacate judgments for fraud on the court are not subject to the one year time limitation. By treating a case where one of the parties' attorney, as an officer of the court, submits an altered document as one of general fraud rather than fraud on the court, the Ninth Circuit greatly reduced the institutional checks necessary to uphold the integrity of the legal system.

The holding by the Ninth Circuit substantially curtailed the ability of a person aggrieved by fraud on the court to get relief, contrary to this Court's precedent. *Cf.*, *Marshall v. Holmes*, 141 U.S. 589, 597 (1891) (judgment may be vacated if based upon a forged document). In *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944), *overruled on*

other grounds, *Standard Oil Co. of California v. United States*, 429 U.S. 17 (1976), the Court reversed the order of the Third Circuit and directed a prior judgment which was procured by fraud on the court be vacated. In *Hazel-Atlas*, Hartford wished to patent a machine, but was encountering stiff opposition to the patent application. In order to improve its application, the lawyers for Hartford wrote an article espousing its virtues, and convinced the president of the Flint Glass Worker's Union to sign the article as if he had written it. *Id.*, 322 U.S. at 241. The patent was then approved. Hartford later sued Hazel-Atlas for infringement of the patent. The District Court dismissed the action, finding no infringement. In its brief to the Third Circuit Court of Appeals, counsel for Hartford directed the Third Circuit to the article, and alleged it was written by the President of the Flint Glass Worker's Union. The Third Circuit reversed and directed judgment for Hartford. Apparently Hazel-Atlas' attorneys had information tending to prove that the article was

a sham at the time of the District Court trial, but did not further explore the matter, relying on other, successful defenses. *Id.* After the Circuit Court reversed the District Court, Hazel attempted to procure an affidavit from the President that he did not write the article, but Hartford convinced him to sign a false affidavit that he did write it. Nine years after the Circuit Court's opinion Hazel-Atlas learned of these facts. It then moved to vacate the judgment. The Supreme Court reversed the Circuit Court and granted relief from the judgment. The Court held that the fraud was a wrong against the institution of the legal system, and courts must always be empowered to grant relief from judgments obtained under such circumstances. *Id.*, 322 U.S. at 246.

Since this Court's opinion in *Hazel-Atlas*, Federal Rule of Civil Procedure 60 has been amended. Rule 60(b) specifically provides that the section does not limit the ability of the Federal Courts to entertain independent actions to vacate

judgments for fraud on the court. In conflict with both the language of the rule and the decisions of the other Courts of Appeals, the Ninth Circuit in this case held that a claim for fraud on the court is not cognizable as it is subsumed within Rule 60(b)(3). (A. 2-3). This Court has further recognized other bases for vacating orders when the public's confidence in the judicial system would otherwise be undermined. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988) (judgment may be vacated when judge improperly refuses to recuse himself or herself).

The Ninth Circuit's opinion in the present case creates a conflict among the Circuit Courts of Appeals. The other Courts of Appeal have firmly held that Rule 60(b)(6) may be used to vacate judgments obtained by fraud on the court without the one-year requirement. *Weldon v. United States of America*, 70 F.3d 1, 5 (2d Cir. 1995) (Court has jurisdiction to entertain a motion for fraud on the court outside one year, even if it is

labeled as a Rule 60(b)(3) motion). The Third Circuit has held that serving false answers to interrogatories is actionable as fraud on the court. *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3d Dep't 1987), *cert den.*, 482 U.S. 915 (1987). The Federal Circuit has followed *Hazel-Atlas* and has held that a judgment obtained by the submission of forged and altered documents may be set aside under Rule 60(b)(6). *Fraige v. American-National Watermattress Corp.*, 996 F.2d 295, 299 (Fed. Cir. 1993). The Ninth Circuit's holding in this case conflicts with these holdings.

Here, Camden's allegations are that Hurt's counsel altered the settlement agreement before presenting it to the court for the entry of judgment. This is precisely the type of fraud - deception by an attorney as an officer of the court - which has long been held to be encompassed in the term "fraud on the court" which is renders a judgment amenable to vacatur under Rule 60(b)(6). *Meindl v. Genesys Pacific Technologies,*

Inc. (In re Genesys Data Technologies, Inc.), 204 F.3d 124, 130 (4th Cir. 2000). The reasoning of the Ninth Circuit, which would hold that such fraud must be treated as general fraud subject to the one-year limitation of Rule 60(b)(3) would make it more difficult to obtain relief from judgments which are obtained by methods which are an affront to the orderly administration of justice and would undermine the public's confidence in the judicial system.

C. The Ninth Circuit rewrote Rule 60(b)(3) when it held that it applied to an entity in privity with an original party.

By holding that "an adverse party" referred to in Rule 60(b)(3) includes a party in privity with the original party (A. 4), the Ninth Circuit rewrote Rule 60(b)(3). The rule says that a court may vacate a judgment for fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party. Fed. R. Civ. P. 60(b)(3). It does not mention parties in privity with original parties. This

Court has previously granted certiorari to address conflicts concerning the interpretation of the Federal Rules of Civil Procedure. *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) (interpretation of Rule 11). The Ninth Circuit's holding in this case places an impossible burden upon successors in interest. If a judgment clouding title was obtained by fraud more than one-year before the successor obtained its interest, the courts cannot eradicate the fraud. This is absurd, and an improper reading of the rule.

D. The writ should be granted because the Ninth Circuit's ruling that Rule 60(b)(3) applied conflicts with the decisions of other courts which have held that fraud committed by a party's representative is not fraud committed by "an adverse party" within the meaning of the Rule.

In holding that Rule 60(b)(3) applied, and therefore Rule 60(b)(6) could not be invoked, the Ninth Circuit held that Camden was an adverse party because of its alleged privity with entities that were parties to the judgment. (A. 3-4). However,

this holding ignores the fact that Camden asserted that the fraud was committed, not by Hurt, but by Hurt's representative, Eagleburger. Regardless of any alleged privity between Camden and other parties to the judgment, other Circuits, including a previous panel of the Ninth Circuit, have held that a party's representative is not an "adverse" party within the meaning of Rule 60(b)(3). The Ninth Circuit held, in *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989) that Rule 60(b)(3) does not apply when the conduct is attributed to a party's attorney. The writ should be granted to address whether fraud committed by an officer of the court is considered fraud by an adverse party within the meaning of Rule 60. If it is not, then the courts below erred in holding that Camden was bound by the one-year time limit contained in Rule 60(b)(3).

POINT II THE WRIT OF CERTIORARI SHOULD BE GRANTED TO BECAUSE THE HOLDING OF THE NINTH CIRCUIT THAT THERE ARE NO EXCEPTIONS TO THE ONE-YEAR LIMIT CONTAINED IN RULE 60(B)(1)-(3) IS AT ODDS WITH

SUPREME COURT PRECEDENT AND IMPROPERLY RESTRICTS THE POWER OF THE FEDERAL COURTS TO ERADICATE FRAUD WHERE THERE ARE EXTRAORDINARY CIRCUMSTANCES WHICH PREVENT AN ENTITY FROM BRINGING AN APPLICATION WITHIN ONE YEAR.

The Ninth Circuit held in this case that Camden and Wakefield were restricted by the one-year time limit contained in Rule 60(b)(3) notwithstanding the fact that neither corporation was even formed nor took title within one year of the date that the judgment was entered. This holding conflicts with the opinion of this Court in *Klapprott v. United States*, 335 U.S.601 (1949), as well was the opinions of other Circuit Courts of Appeals which have held that the one-year time limit contained in Rule 60(b)(1)-(3) will not apply if a movant is prevented from filing a motion within one year due to no fault of its own. In *Klapprott*, the United States commenced a proceeding to cancel a naturalized citizen's certificate of

naturalization. Klapprott was arrested before the expiration of the time to file an answer to the complaint. He did not answer the complaint and a default judgment was entered against him canceling his certificate of naturalization. More than four years later, while still imprisoned, Klapprott filed a petition to set aside the judgment. The Court held that Klapprott's incarceration effectively prevented him from filing his motion earlier, and that the revocation of his citizenship without a hearing on the merits would manifest a grave injustice. The Court therefore allowed the petitioner to move to set aside the judgment. *Id.*, 335 U.S. at 609. Other Circuits have also permitted applications to vacate judgments to be filed after the one-year time limit when extraordinary circumstances prevented the party from moving earlier. In *United States v. Baus*, 834 F.2d 1114, 1121 (1st Cir. 1987), the Court held that it was error for the District Court to deny a Rule 60(b) motion without a hearing as to whether the motion could not have been

brought earlier when the movant demonstrated a colorable claim that the government repeatedly promised him that they would not execute on the judgment until there had been a judicial determination of indebtedness. In *United States v. Cirami*, 563 F.2d 26, 31 (2d Cir. 1976), the Court held that a motion made two years after the judgment was timely when the counsel for the movants suffered from a mental illness which precluded him from representing them - leading to a default judgment. The Court held that the default of the attorney was due to the mental illness, and the movants could not have discovered the information earlier because he continued to tell them that he was taking care of the file. *Id.*, 863 F. 2d at 34.

Here, there were extraordinary circumstances for Camden's failure to bring an application within one year of the judgment. Neither Camden nor Wakefield was in existence at the time the judgment was entered in 1990, nor were they formed within one year of that date. (A. 10). It would have

been impossible for Camden to file its Rule 60(b) motion within one year of the entry of the judgment. Camden should not be held to a time-limit that it had no ability to meet. Had Camden attempted to file a motion to vacate the judgment within one-year, prior to its receiving an interest in the subject properties, Hurt would have argued that it lacked standing. The Federal Rules of Civil Procedure were not meant to place entities in this type of "Catch-22."

In a slightly different context, this Court has held that persons who were not parties to a consent decree could later challenge that decree. In *Martin v. Wilks*, 490 U.S. 755, 761 (1989), white firefighters sued the City of Birmingham, Alabama alleging that they were deprived of promotions in favor of less qualified African-American firefighters. The African-American firefighters were promoted in reliance upon several consent decrees. This Court held that, because the white firefighters were not parties to the consent decrees, they

were not bound by them, and could later challenge them in a separate action. In the present case, Camden is even one step further removed because neither corporation even existed at the time the judgment was entered. To preclude relief under these circumstances would result in fundamental unfairness to Camden. Camden purchased real property on the good faith belief that the person who sold it had good title. It later discovered that a judgment had been fraudulently entered granting title in the property to another party. It was not possible for Camden to discover this fraud within one year of the judgment because neither corporation even existed within one year of the judgment.

The lower courts overly restrictive view of Rule 60, as allowing no exception to the one-year time limit, prevents the federal courts from effectively managing their cases so as to remedy fraud on the court under the Supreme Court's

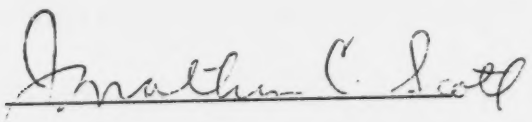
supervisory role. This Court should grant the petition for writ of certiorari so as to address these crucial questions.

CONCLUSION

For the foregoing reasons, Camden Properties, Corp. and Wakefield Properties, Ltd. request that this Court grant the Petition for Writ of Certiorari and grant them such other and further relief to which they may be entitled.

Dated: September 10, 2001

Respectfully Submitted,



SCOTT & SCOTT, LLP
Jonathan C. Scott, Esq.
999 Walt Whitman Road
Melville, NY 11747
(631) 271-6448
Attorneys for Petitioners

Filed
Jun 12 2001
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re: NORMA J. HURT, aka Norma J. Pace

Debtor.

No. 00-15978
BAP No. AZ-99-01093KRRY

CAMDEN PROPERTIES CORPORATION;
WAKEFIELD PROPERTIES, LTD.,

Appellants,

v.

NORMA J. HURT,

Appellee.

MEMORANDUM*

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Klein, Russell, and Ryan, Judges, Presiding

Argued and Submitted May 15, 2001
San Francisco, California

---

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Before: HUG and T.G. NELSON, Circuit Judges, and SHADUR, **District Judge.

This court independently reviews a bankruptcy court's decision without deferring to the BAP's decision. Owens-Corning Fiberglass Corp. v. Ctr. Wholesale, Inc. (In re Ctr. Wholesale), 759 F.2d 1440, 1445 (9th Cir. 1985). We review a bankruptcy court's decision on a Fed. R. Civ. P. 60(b) motion for abuse of discretion. In re Hammer, 940 F.2d 524, 525 (9th Cir. 1991).

1. The bankruptcy court did not abuse its discretion in concluding that Appellant's Fed. R. Civ. P. 60(b) motion was untimely. Rule 60(b)(3), which provides relief where a judgment or order was based on fraud, has a one-year limitations period, which Appellants far exceeded.

We reject Appellant's contention that Rule 60(b)(6) is applicable. That provision cannot be used as a back-up for seeking relief that is otherwise available elsewhere in Rule 60(b). United States v. Alpine Land & Reservoir Co., 984 F.2d 1047,

---

**Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

1050 (9th Cir. 1993). Here, Rule 60(b)(3), addressing fraud, is clearly applicable to Appellants' allegations. Appellants dispute the applicability of Rule 60(b)(3), contending that the alleged perpetrator of the fraud is not "an adverse party" as to them because they were not parties to the original judgment. However, because Appellants have asserted standing[1] by virtue of their privity with parties to the judgment, they stand in the shoes of their predecessors. From that standpoint, the perpetrator of the fraud is an adverse party as to the Appellants, and Rule 60(b)(3) does apply. In any event, the bankruptcy court did not abuse its discretion by concluding, in the alternative, that Appellants failed to meet the less stringent "reasonable time" filing deadline imposed by Rule 60(b)(6).

Finally, Appellants allege error in the bankruptcy court's failure to construe their motion as an "independent action" to reopen the earlier judgment. It bears repeating that Appellants have asserted standing by virtue of their privity with parties to that

---

[1]We assume without deciding that Appellants have standing.

judgment. It necessarily follows that they cannot achieve a more favorable position than their predecessors. Were the original parties to the judgment the ones seeking to reopen it, we would have no difficulty in holding that they were time barred. No reason has been shown as to why laches and finality doctrines would not, at this late date, bar the original parties from bringing an independent action. Ample opportunity existed for Appellants' predecessors to discover the alleged fraud. The mere sale of the property by the predecessors does not create additional rights in favor of Appellants to attack the judgment. Accordingly, we find no error in the bankruptcy court's failure to address Appellant's motion as an independent action.

3. Finally, in her brief Hurt asks the court to sanction Appellants under Fed. R. App. P. 38 for filing to frivolous appeal. However, as the advisory committee notes make clear, a statement in a brief does not give sufficient notice to the person sought to be sanctioned. Before sanctions may be imposed, the person to be sanctioned must have notice and an opportunity to respond. Accordingly, attorney Jonathan C. Scott, the law firm of Scott &

Scott, L.L.P., Camden Properties, and Wakefield Properties are hereby ORDERED to show cause why sanctions should not be imposed for filing a frivolous appeal. Within 21 days, counsel for Hurt is ORDERED to file an affidavit of fees and costs, and suggest the amount to be awarded. Mr. Scott, Scott & Scott, Camden, and Wakefield will then have 15 days to comply with the order to show cause and to object to the affidavit of fees and costs.

AFFIRMED.

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In Re: NORMA J. HURT, fka Norma J. Pace

Debtor.

BAP No. AZ-99-1093-KRRy
BAP No. AZ-99-1237-KRRy

CAMDEN PROPERTIES CORPORATION, and
WAKEFIELD PROPERTIES, LTD.,

Adv. No. 87-199

Appellants,

v.

MEMORANDUM[1]

NORMA J. HURT,

Appellee.

Argued and Submitted on November 17, 1999
at Phoenix, Arizona

Filed February 18, 2000

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable James M. Marlar, Bankruptcy Judge, Presiding.

Before: KLEIN, RUSSELL, and RYAN, Bankruptcy Judges.

---

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of this case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 13 and Circuit Rule 36-3.

Two corporations, Camden Properties , Corp. and Wakefield Properties, Ltd. ("appellants"), appeal the denial of a motion for reconsideration of a judgment entered in 1990. The bankruptcy court denied the motion and imposed sanctions. We AFFIRM the denial of the motion and REVERSE the sanctions award insofar as it applies to appellants.

This is a further incident in the decades old Pace-Hurt feud. In the last incident, Pace v. Hurt (In re Hurt), BAP No. AZ-99-1006-KAB, slip op. (November 1, 1999), we affirmed a sanctions award in excess of $250,000.

FACTS

Appellee Norma J. Hurt ("Hurt") and Milton G. Pace ("Pace") were divorced in 1978. Pace sought to frustrate the implementation of the real property award in favor of Hurt by granting interests in the properties awarded to Hurt to a number of corporations that he owned or controlled.

Pace used some of these corporations to file and involuntary bankruptcy petition against Hurt in 1985.

Hurt filed an adversary proceeding to clear title to the various properties in 1987. Hurt, Pace, and the other creditors entered into a settlement in 1990. That settlement resulted in an order quieting title and dismissing claims regarding the properties (the "1990 judgment"). The parties to the 1990 judgment agreed that they would release deeds, liens, or other encumbrances on the properties listed on an attachment to the settlement agreement. The parties had struck out and initialed various properties on the list which Hurt did not claim an interest. The settlement agreement was signed by the parties or their legal representatives and was approved by the bankruptcy court after a hearing on January 23, 1990.[2]

---

[2] There were three objections made to the 1990 judgment. Milton Pace, acting in pro per, filed paperwork that the bankruptcy court construed as objection and overruled.

Another party, Sunway Systems, Inc., filed and objection to the form of the order and judgment and in the alternative to set aside the order and judgment under Rule 60(c). The basis for Sunway's objection was that the Hurt-Pace divorce judgment had not been renewed as required by Arizona law and therefore the validity of a certain lien was in question, changing Sunway's position on settlement. Sunway's CEO was Milton Pace. The court denied the motion to set aside the order and overruled the objection.

The third objection was from a group of corporations that were parties to the settlement. They objected to the form of the order and

The 1990 judgment was appealed by Pace. Both the BAP and the Ninth Circuit affirmed. Certiorari was denied by the U.S. Supreme Court.[3]

Notwithstanding that the 1990 judgment was litigated all the way to the U.S. Supreme Court, the appellants want us to order that it be reopened. The appellants' ground for the motion to reconsider that is now in issue is that the 1990 judgment had the wrong copy of the Hurt-Pace settlement agreement attached to it. The appellants allege that the Hurt's attorney hoodwinked Pace by attaching the wrong copy before it was submitted to the court for

---

judgment based on a question of whether the settlement required Hurt pay a certain amount of back taxes before they were required to perform under the agreement. The bankruptcy court did not believe such payment was necessary under the agreement and pointed out that, if needed, Hurt had the ability to enforce the corporations' compliance with the terms of the agreement.

The bankruptcy court modified the judgment order to clarify certain and other terms and it was entered on April 4, 1990.

At the hearing on the objections, the bankruptcy court stated that before conducting further proceedings it would want to determine "the extent to which Milton Pace is the driving force of all these objection attempts to keep the litigation going and load more obligations on Norma Hurt." Transcript of March 12, 1990, hearing, 20:20-23, ER, p. 146.

[3] Pace v. Hurt (In re Hurt), 26 F.3d 130, 1994 WL 224263 (9th Cir. 1994), cert. denied, 514 U.S. 1098 (1995).

entry and that this fraud was not uncovered until the sale of property that was the subject of the separate appeal heard by the BAP in July 1999. ITNX v. Hurt (In re Hurt), BAP No. AZ-98-1532, slip op. (Sept 13, 1999).

The appellants were not formed until 1997 and 1998 and were not parties to the 1990 Judgment. Instead, they received interests in two properties that were part of the 1990 judgment through subsequent purchase or assignment.[4]

On October 1, 1998, the appellants filed a motion for reconsideration and/or to set aside judgment, seeking to overturn the 1990 order. The bankruptcy court held a hearing on January 20, 1999.

The appellants argued that they have standing to bring the motion on the basis that the property interests acquired after their respective formations in 1997 and 1998 were affected by the 1990 judgment - that the subject properties should not have been

---

[4] Hurt's counsel contended during oral argument that both corporations are indirectly connected with Pace but did not make a formal record to that effect. While the assertion is plausible, we decide this appeal on the assumption that there is no connection.

included in the 1990 judgment and that the title is clouded.[5]

The bankruptcy court denied the motion on the grounds that the appellants did not have standing to bring the motion and that the motion was not timely.[6] The court further sanctioned both the appellants and their attorney $10,000 to cover Hurt's attorney fees in responding to the motion. This appeal ensued.[7]

ISSUES

Whether the bankruptcy court abused its discretion in denying the motion for reconsideration.

---

[5] Appellants claim that Hurt's attorney submitted a copy of the list of properties that were the subject of settlement agreement to the court that became part of the judgment. They further claim that the attorney wrote the word "in" next to two of the properties, when in fact the properties were not to be included in the settlement. The appellants own interests in these two properties.

[6] The court ruled that the motion was not timely under Federal Rule of Civil Procedure 60 (b) (1)-(3) and that if subsection (b) (6) were applicable, that the motion was not brought within a reasonable time.

[7] Although there are two docket numbers, there is only one appeal. One notice of appeal was filed prematurely and assigned a docket number. The second notice of appeal was also assigned a docket number. The appeals were later administratively consolidated.

Whether the appellants had standing to make a motion under Federal Rule of Civil Procedure 60.

Whether the bankruptcy court abused its discretion in assessing sanctions.

STANDARDS OF REVIEW

A bankruptcy court's denial of a motion for reconsideration is reviewed for an abuse of discretion. Alexander v. Bleau (In re Negrete), 183 B.R. 195, 197 (9th Cir. BAP 1995), citing S.G. Wilson Co. v. Cleanmaster Indus., Inc. (In re Cleanmaster Indus., Inc.), 106 B.R. 628, 630 (9th Cir. BAP 1989), aff'd, 103 F.3d 139 (9th Cir. 1996).

Whether a party has standing is a question of law that we review de novo.

Orders imposing sanctions under Federal Rule of Bankruptcy Procedure 9011 are reviewed for abuse of discretion. California Employment Dev. Dep't v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147, 1152 (9th Cir. 1996); Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 283

(9th Cir. 1996). A court abuses its discretion by applying "an incorrect legal standard or [if] its findings of fact are clearly erroneous." Duff v. United States Trustee (In re California Fidelity, Inc.), 198 B.R. 567, 571 (9th Cir. BAP 1996).

DISCUSSION

I

A motion for relief from judgment may be brought under Federal Rule of Civil Procedure 60(b) if the moving party can show:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence;

(3) fraud or other misconduct;

(4) a void judgment;

(5) a satisfied or discharged judgment; or

(6) any other reason justifying relief from operation of judgment.

Fed R. Civ. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9024.

A

The appellants' allegation of fraud on the part of Hurt's attorney falls squarely under Rule 60(b)(3).

Under Rule 60(b)(3)'s explicit time limit, all motions must be brought within one year of the entry of the judgment. The appellants' motion was brought more than eight years after entry of judgment.

1

The appellants attempt to circumvent the one-year limitation by arguing that a "discovery" rule should be applied so that the motion could be regarded as timely if brought within one year of the discovery of the fraud. This argument lacks merit.

In the first place, there is no plausible reason for the delay in "discovering" the supposed fraud or mistake. If the settlement document was indeed inaccurate, any such inaccuracy was apparent on the face of the 1990 judgment that Pace litigated all the way to the U.S. Supreme Court and should have been identified by him in that process.

Moreover, it is settled that the one-year requirement of

Rule 60(b) (1)-(3) cannot be extended. Moreover, it is jurisdictional. Nevitt v. United States, 886 F.2d 1187, 1188 (9th Cir. 1989); Scott v. Younger, 739 F.2d 1464, 1466 (9th Cir. 1984).

2

As an alternative argument in the nature of confession and avoidance, the appellants urge that there is no applicable one-year limitation of Civil Rule 60(b)(3) in bankruptcy. They reason that there is an exception provided in Bankruptcy Rule 9024. This argument similarly lacks merit.

As relevant here, Rule 9024 excuses compliance with the one-year time limit for "reconsideration of an order allowing or disallowing a claim against the estate entered without a contest" but not otherwise.[8]

---

[8] The complete rule provides:
Rule 60 Fed. R. Civ. P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330.

The judgment in question does not constitute and order allowing or disallowing a claim. Nor, in view of the fact that Pace complained all the way to the U.S. Supreme Court, was it entered without a contest. Either deficiency is sufficient to overcome the exception to the one-year limit. Cumulatively, they the strip the argument of merit.

3

In short, the court lacked jurisdiction to entertain a Rule 60(b)(3) motion. Nevitt, 886 F.2d at 1188; Scott, 739 F.2d at 1466. Hence, its refusal to grant relief under Rule 60(b)(3) cannot be upset on appeal.

B

The court also held that, for purposes of Rule 60(b) (6), the motion was not brought within a "reasonable" time and, hence, was untimely. Whether a motion under Rule 60(b)(6) is brought

---

Fed. R. Bankr. P. 9024.

with a "reasonable time" depends on the facts of the particular case, which are analyzed in the context of any prejudice created by the delay and whether there is a good reason for failing to act sooner. See United States v. Holtzman, 762 F.2d 720 (8th Cir. 1985).

The appellants contend that they must have satisfied the "reasonable" requirement because they were neither formed nor acquired their interest in the affected property until years after the 1990 judgment.

Relief under Rule 60(b)(6) is reserved for extraordinary circumstances that are raised within a reasonable time and is not a substitute for untimely motions under Rule 60(b)(3). United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049-50 (9th Cir. 1993) (Rule 60 (b)(1)).

The reasonableness of time in each instance is assessed on a case-by-case basis and calls for an exercise of discretion. United States v. Wyle (In re Pacific Far East Lines), 889 F. 2d 242, 249 (9th Cir. 1989).

The court engaged in a particularized review of the

situation. It concluded that the interval between the 1990 judgment and the 1998 motion was not "reasonable" and, describing it as "patently unreasonable," made clear that it did not regard the particularized facts as presenting a close question. Hence, it exercised its discretion to deny the motion.

We agree that the interval was not "reasonable" because, among other things, it is not reasonable to expect to revive a long-resolved matter by the devise of creating new entities and transferring property to them. The court did not abuse its discretion in this respect.

II

The bankruptcy court also held that the appellants lacked standing to bring the motion because they are newcomers, who as corporations, had not come into existence at the time of the judgment. The appellants assert that they have standing based on the fact that they hold property rights that are affected by the 1990 judgment.

The appellants argue that case law supports their

contention that any party that may have a property right affected by a judgment has standing to bring a Rule 60(b) motion. They draw their main support from a case that makes a narrow holding: a "60(b) motion is only maintainable by a party (or his privy) or by his legal representative." Cheadle v. Appleatchee Riders Assoc. (In re Lovitt), 757 F.2d 1035, 1040 (9th Cir. 1985).

Although the appellants do no argue directly that they are in privity with the holders of the property interests at the time of the 1990 judgment, it appears that they may in fact have standing through privity. See Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 188 (5th Cir. 1990) (applying Texas law, but recognizing that nonparty to original litigation is in privity with party for res judicata purposes if he is successor in interest to party's interest in property).

The issue is, however, inconsequential. Any error with respect to standing would not affect the outcome of this appeal in light of the conclusions about the timeliness issue.

Assuming that the appellants do have standing to bring a Rule 60 motion on the basis of privity, the fact is that the motion

was untimely. Treating the motion as a motion under Rule 60(b)(3), it was not brought within one year of the entry of the judgment. It does not matter that the appellants did not acquire their interest until after the deadline; subsequent transfers cannot be used as a basis to resuscitate a lapsed deadline.

The transactions in 1997 or 1998 by which the appellants acquired their interest in properties that were subject to the 1990 judgment did not launder the effect of Pace's seven or eight year delay. Whatever the appellants acquired came replete with all the smudges from Pace's fingerprints.

Treating the motion as a motion under Rule 60(b)(6), it was not brought within a reasonable time for the same reason that Pace could not bring a timely motion. Assuming that the appellants are true strangers to Pace who acquired their interest in arm's length transactions, then any remedy they may have is against Pace. In short, the bankruptcy court did not abuse its discretion when it denied the motion.

III

The appellants also appeal the award of $10,000 in sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011 to the extent that they operate against the appellant corporations in their capacities as represented parties. (There is no appeal of award against their counsel.)

They contend the sanctions against them were both substantively and procedurally incorrect. Substantively, they say that the sanctions against them in their capacity as represented parties were prohibited by Rule 9011(c)(2(A). Procedurally, they say that the procedure mandated by Rule 9011(c)(1) was not followed.

In construing Rule 9011, we consider authorities interpreting Federal Rule of Civil Procedure 11, on which Rule 9011 was modeled. Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 136 B.R. 545 (9th Cir. BAP 1992).

A

The appellants are incorrect with respect to the substantive question. A represented party may be sanctioned in some

circumstances.

The rule is straightforward. To the extent that the basis for sanctions is Rule 9011(b)(2) ("the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law"), then sanctions cannot be awarded against a represented party. Fed. R. Bankr. P. 9011 (c)(2)(A).

Conversely, to the extent that the basis for sanctions is Rule 9011(b)(1) (improper purpose), Rule 9011 (b)(3) (evidentiary support for allegations and factual contentions), and Rule 9011(b)(4) (denials of factual contentions warranted by evidence), then a represented party may be sanctioned. Fed R. Bankr. P. 9011(c).

The record does not indicate that the specific subsection of Rule 9011(b) that was the basis for acting under Rule 9011. Thus, we are unable to determine whether an award was permitted as a substantive matter in this case.

B

We can, however, resolve the appeal because there is merit to the appellants' procedural challenge to the sanctions under Rule 9011.

It is plain that Hurt did not comply with the straightforward procedural requirement of Rule 9011(c)(1)(A) that the target of the motion be afforded an opportunity to retract the offending pleading, motion, or other paper before the separate motion for sanctions is filed. Fed. R. Bankr. P. 9011(c)(1)(A).

Thus, Hurt's motion was ineffectual to launch Rule 9011 sanctions and cannot be the appropriate procedural basis for sanctions.

CONCLUSION

The bankruptcy court did not abuse its discretion in denying the motion for reconsideration. We therefore AFFIRM that portion of the judgment.

To the extent that the sanctions award operates against the appellants as represented parties (and only to that extent), we

REVERSE.[9]

KLEIN, Bankruptcy Judge concurring:

I join the majority, but the analysis of sanctions is incomplete.

The trial court may have been thinking that it was acting on its own initiative, as it is permitted to do.

In order to impose Rule 9011 sanctions on its own initiative, the trial court my comply with "show cause" clause of Rule 9011(c)(1)(B) that applies when the court acts on its own initiative.

The record that was supplied to us does not show whether there was compliance with the "show cause" requirement of Rule 9011(c)(1)(B). The memorandum decision does not cover the point. If it was spread upon the record elsewhere, the parties have not supplied that portion of the record. It is fair to infer that there was not such compliance.

And there is further defect inherent in the award in favor

---

[9] The award against counsel was no appealed. It stands.

of Hurt. The rule is that a monetary sanction imposed by the court under Rule 9011 will be paid as a penalty into the court rather than as compensation to a party. Fed. R. Bankr. P. 9011 (c)(2)(C)(A); Barber v. Miller, 146 F.3d 707, 711 (9th Cir. 1998).[10]

While it is conceivable that the court may have been exercising authority to sanction on some basis other than Rule 9011, the record does not suggest that it was doing so.

[10] In view of the other defects, it is not necessary to consider whether any exception to the general rule applies in bankruptcy cases by virtue of the rules of construction for "include" and "or" under 11 U.S.C. § 102(3) & (5), as incorporated in the rules by Federal Rule of Bankruptcy 9001.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re: Chapter 11

NORMA J. HURT, fka NORMA J. PACE,
Debtor, No. 85-3802 PHX JMM

NORMA J. HURT,
Plaintiff, ADV. 87-199

vs. ORDER

KACHINA PLYWOOD, INC., ROBERTSON WOOD PRODUCTS, INC., INTERMOUNTAIN WOOD PRODUCTS, INC., PERCO, INC., ZECO, INC., NEVADA WEST SYSTEMS, INC., ANDREW B. SPAIN, MILTON G. PACE,
Defendants.

On February 1, 1999, this court issued its written Memorandum Decision regarding the motions of Camden Properties Corp. and Wakefield Properties, Ltd., which sought the setting aside of a Judgment in this matter. Those entities not only had no standing to urge such position they also had no meritorious grounds. In fact, the Motions were entirely frivolous and caused the respondent to incur needless fees and costs. After reviewing the subsequently-filed pleadings regarding attorneys' fees and costs, the court now issues its final, appealable Order relative to this matter. After reviewing the fees and costs request, the court is

of the opinion that the sanction requested ($18,634.08) is too high. While the court has little difficulty in finding that the time expended by attorneys Penterman and Eagleburger was reasonable, the court cannot accept that an additional 118 hours were necessary to present an opposition to the motion to set aside the Judgment! The guiding force behind sanctions should be to sanction appropriately, not punish the opposition with the overuse of a trainee, Accordingly,

IT IS ORDERED DENYING the Motions of Camden Properties Corp. and Wakefield Properties, Ltd., which motions seek reconsideration and/or the setting aside of the Judgment entered in this case which was entered on April 3, 1990.

IT IS FURTHER ORDERED assessing monetary sanctions against Camden Properties Corp., Wakefield Properties, Ltd., and attorney C.D. Owens, jointly and severally, in the amount of $10,000.00 (representing some attorneys' fees and some costs). Such sum is assessed as a sanction pursuant to F.R.Civ.P. 11 and F.R. Bankr. R. 9011.

IT IS FURTHER ORDERED that such sanction amount

shall be paid to the debtor's attorneys within 30 days of the date of this Order.

Any appeal must be filed within 10 days. Bankr.R. 8002.

Dated this 30th day of March, 199.

JAMES M. MARLAR
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re: Chapter 11

NORMA J. HURT, fka NORMA J. PACE,
Debtor, No. 85-3802 PHX JMM

NORMA J. HURT,
Plaintiff, ADV. 87-199

vs. MEMORANDUM DECISION RE: MOTION FOR RECONSIDERATION AND/OR TO SET ASIDE JUDGMENT.

KACHINA PLYWOOD, INC., ROBERTSON WOOD PRODUCTS, INC., INTERMOUNTAIN WOOD PRODUCTS, INC., PERCO, INC., ZECO, INC., NEVADA WEST SYSTEMS, INC., ANDREW B. SPAIN, MILTON G. PACE,
Defendants.

On January 20, 1999, this court heard oral argument on the Motion of Wakefield Properties and Camden Properties for Reconsideration and/or to Set Aside the Court's Judgment of April 3, 1990. C.D. Owens appeared on behalf of the moving parties; G. Gregory Eagleburger and Lester L. Penterman appeared on behalf of the reorganized debtor. For the reasons set forth below, this matter is DENIED. A separate order will be entered. If an appeal

is taken, this must occur within 10 days of the entry on the Clerk's docket. Bankr. R. 8002.

BACKGROUND

The Motion seeks to set aside a Judgment entered on April 3, 1990, in Adversary No. 87-199. The basis for the request is F.R.Civ.P. 60(b), made applicable to bankruptcy proceedings by Bankr. R. 9024. That Judgment was a stipulated order, based upon a settlement reached by the parties. Thereafter, some of the parties, who were dissatisfied with the settlement, appealed and made an effort to set aside the Judgment or to obtain a reversal. The appeal was unsuccessful. Both the Bankruptcy Appellate Panel and the Ninth Circuit Court of Appeals affirmed the Judgment. The appellants filed a Writ of Certiorari to the United States Supreme Court, but it was denied. Consequently, the Judgment in Adversary 87-199 is final.

MOTION FOR RECONSIDERATION

A "Motion for Reconsideration" is an inappropriate method to request that a judgment be set aside. No authority was

cited for this unique procedural request. It will be there denied. The exclusive method for obtaining this relief is by a F.R.Civ.P. 60 motion. See *In Re Cleanmaster Industries, Inc.*, 106 B.R. 628 (Bankr. 9th Cir. 1988). However Rule 60(b) is not a substitute for an appeal, and courts generally will not allow a party to use this ruled to obtain a reconsideration of the merits and declare the original judgment void. *In re Atkins*, 134 B.R. 936, 939 (Bankr. 9th Cir. 1992).

STANDING

Neither Camden Properties nor Wakefield Properties were parties to the Judgment of April 3, 1990. Their claim, in this case, is made because they are the most recent owners of properties which derived, at some point in the chain of title, from one or more of the defendants in Adversary No. 87-199. Neither Camden nor Wakefield have independent standing to bring this motion, as neither corporation was even in existence on April 3, 1990, when the Judgment was entered.

If Camden and Wakefield have now obtained property which was clouded in some fashion by their predecessors, their recourse is against their seller/assignor/predecessor. They do not, merely by acquiring an interest in real estate, simultaneously acquire rights to seek relief from a judgment in a legal proceeding in which they were never a party. No document was attached to the motion showing an assignment of the legal position from one of the parties to the litigation. However, even if such a legal position were effectively transferred, no reason has been shown as to why waiver, estoppel, laches and finality doctrines would not, at this late date, bar the original parties and their assignees from making this 60(b) motion.

The Ninth Circuit law concerning standing is clear. To have standing to bring a Rule 60(b) motion challenging the prior judgment, Camden and Wakefield must show that they had property rights affected by the judgment. *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1445-46 (9th Cir. 1985). Camden and Wakefield had no interests in the subject property, now were these entities in existence at the time of the judgment was rendered.

Therefore, Camden and Wakefield lack standing to bring a 60(b) motion.

RULE 60(b)

Fed. R.Civ. 60(b) sets forth general grounds upon which a judgment can be set aside. It is made applicable to bankruptcy proceedings by Bankr. R. 9024. The grounds of fraud, newly discovered evidence, excusable neglect, inadvertence, surprise, or misconduct of an adverse party are contained in subparagraphs (b)(1), (2) and (3) of Rule 60, and each of those grounds carry a one-year limitation concerning when such a motion can be brought. Clearly, the instant motion was not brought within that period of time. In fact, it has been almost nine years since Judgment was rendered on April 3, 1990. The movants' case is therefore time-barred. Subsections (4) and (5), which involve payment, satisfaction or a void judgment, do not apply in this case. Subsection 60(b)(6) allows the court to set aside, during any "reasonable time," a judgment for "any other reason justifying

relief."

The facts espoused by the movants fall clearly within subparts 1, 2, and 3 of the rule. Essentially, the argument raised by the movants is that counsel for the plaintiff wrongfully attached an exhibit to the Judgment which was different than that which had been agreed upon by the parties. If true, this conduct would fall within categories of fraud, surprise, or misconduct by an adverse party. All of those reasons, however, require that a 60(b) motion be brought within one year of the entry of the Judgment. Here, especially since the Judgment and its underlying settlement was the very subject matter of the appeal from Adversary 87-199, it is inconceivable that none of the attorneys for any of the appellants, nor the parties themselves noticed, until now, that anything improper had allegedly occurred with respect to the manner in which the Judgment and its attachment was entered. Moreover, the factual basis now asserted for yet another attack on the Judgment is due to Milton G. Pace having recently "discovered" this altered document.

The court finds that, even if subpart (b)(6) were shown to

be applicable, the moving parties have not brought it within the "reasonable time" required by the Rule. Apparently, the moving parties' principal is Milton G. Pace. In any event, it is upon his word of alteration that this motion was brought. This was conceded at oral argument and in other papers filed by Mr. Owens, the attorney for the moving parties. Mr. Pace was a party to the original proceeding, Adversary 87-199 and was one of the of the parties who appealed from the April 3, 1990 Judgment. The court files, in this bankruptcy case, reflect that Mr. Pace has been intimately involved with this case since its inception, and has appeared in this court numerous times, at virtually every stage of this now 15-year old case. He has represented himself in many of the proceedings, and has initiated and/or participated in virtually all of the numerous appeals coming out of this case. Consequently, due to his intimate involvement in virtually every aspect of this case, it is not reasonable to assume that Mr. Pace was unaware of the details of the very record upon which Adversary 87-199 was appealed. Therefore, bringing this motion to set aside the April 3, 1990 Judgment, almost nine years after the

fact, is patently unreasonable. *In re Pacific Far East Lines, Inc.*, 889 F.2d 242, 249 (9th Cir. 1989) (what constitutes "reasonable time" depends on the facts of each case).

SANCTIONS

One of the most difficult tasks assigned to a federal judge is to determine whether sanctions should be awarded against a party or their attorney. Many times, sanction awards must be made against attorneys who are friends or acquaintances or those with unimpeachable professional reputations. Such a task is made difficult by the very nature of the practice of law itself. The practice of law is not an exact science, and ethical rules require that an advocate zealously represent his client within the bounds of the law. Rule 11 of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings by Bankruptcy Rule 9024, arose because conduct which was considered to be abusive of the judicial process was beginning to infest the entire system. This usually involved attorneys carrying zealousness beyond the bounds of propriety. Case law has evolved, in the Ninth Circuit

and elsewhere, which mandates that a court may employ Rule 11 sanctions, in the form of attorneys' fees awardable against a party and/or their attorney, if positions are advanced in a case which was unwarranted, or for which there has been woefully inadequate investigation or legal research. The Ninth Circuit Court of Appeals, in several instances, has noted that the test to be employed by a court, in evaluating the standards for Rule 11 sanctions, must be whether a reasonable attorney, after knowing or learning all the facts and circumstances of the case, would advance such a position. If a reasonable attorney would not objectively do so, sanctions are warranted. Thus, a party's or an attorney's subjective good faith in advancing a meritless position is not a ground for denial of a Rule 11 sanction. Rather, an objective standard is required. The Ninth Circuit noted, in *Zaldivar v. City of Los Angeles*, 7880 F.2d 823, 831 (9th Cir. 1986), that " There is room for a pure heart, empty head defense under Rule 11." (citation omitted). The rule creates a new "affirmative duty of investigation both as to law and as to fact before motions are filed." *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801

F. 2d 1531, 1536 (9th Cir. 1986).

At a minimum, a federal court expects an attorney to advance a cause on behalf of a client who has the standing to make that argument. In addition, the court requires that an attorney make reasonable inquiry into the law and to the facts surrounding the particular case, and to not advance a matter for which there is no legal basis. If a lawyer disregards these responsibilities, and by doing so, subjects innocent persons to the expense of responding to frivolous matters, then Rule 11 is to be used in order to discourage and sanction this conduct, and to prevent pecuniary harm.

Here, the court finds that a minimal amount of research would have disclosed that the parties, which are now seeking to set aside the April 3, 1990 Judgment, had no standing to do so. They were never parties to Adversary 87-199. In fact, they were not even incorporated at the time the Judgment was entered, and did not become incorporated until many years thereafter. Additionally, even if they had existed, no case law was cited for the proposition that a party who purchases a mere fee interest in a

parcel of real estate automatically becomes an assignee of its seller's legal rights in an ancient cause of action that once involved litigation over the same piece of land. The Ninth Circuit has stated that standing is a critical issue which requires the party to have had a pecuniary interest in the matter at hand. On April 3, 1990, when the Judgment was entered, the moving parties did not exist, did not have such an interest, and no document was attached to any of the pleadings before this court to reflect that they became assignees of their seller's legal interest in that lawsuit. Nor did the moving parties cite a single case to support their novel claim of standing.

With regard to the merits of the Fed.R.Civ.P. 60(b), It is apparent from reading the motion that the grounds for attempting to set aside the April 3, 1990 Judgment were grounded in misconduct of an adverse party, to-wit, plaintiffs' counsel allegedly attaching a different document to a form of Judgment than that which had been agreed. A reading of Rule 60(b) would clearly show that such a cause of action mandated that relief be sought within one year of the order from which a party seeks

relief. Eight to nine years later is clearly outside of the Rule. The issue should have been dropped instantly, and pleadings should never have been filed.

CONCLUSION

Sanctions will therefore be assessed against the moving parties and their counsel, jointly and severally. These sanctions will be in a monetary amount equal to the expenses which were required to successfully resist such a motion. Within 15 days, counsel for the debtor are ORDERED to file a single and combined affidavit of fees and costs, and suggest the amount to be awarded. The moving parties will then have 10 days to respond. No further oral argument will be held on this issue. Thereafter, the court will rule and enter a separate appealable Order.

Once a final order is entered, any appeal therefrom must be file within 10 days of its entry by the Clerk. Bankr. R. 8002. Motions for reconsideration shall not be filed and will not be entertained.

Dated this 1st day of February, 1999

JAMES M. MARLAR
U.S. BANKRUPTCY JUDGE